legislative right to changes in the legal character of estates and the titles to property.

An estate is a man's interest in property. The legal character of a man's interest in property is the nature, qualities or relations, under the law, of that interest.

It may be viewed with respect to the property of other men, and the remedies for securing its rights and redressing its wrongs, considered; or it may be viewed with respect to its own nature alone, and its kinds, ownership, or title considered. The changes that may be effected are as varied as the relations of property. Among them may be enumerated the change in its character from converting real into personal, or personal into real property. Again, real property may be changed by changing the quantity of interest therein, whether freehold or less than freehold, the time of its enjoyment, whether in possession, remainder or reversion, or the number and connections of the tenants, whether in severalty or in common. Personal property may be changed in its character as a chose in possession or in action. Again, a very radical, indeed the most important change that can take take place in the legal character of both real and personal property, is effected by a change in its title, by a transfer of its ownership from one individual to another individual, or set of individuals. The legal character of property is also affected and indirectly changed by altering the remedies provided for enforcing its rights.[1] W. W. B.

Cambridge, Mass.

RECENT AMERICAN DECISIONS.

In the Court of Common Pleas of Philadelphia County.—In Equity.

MITCHESON *vs.* HARLAN AND OTHERS.

1. The duty of the Governor in granting letters patent to a corporation under the general railroad law of 1849, in Pennsylvania, upon the certificate of the commissioners named in the special act of incorporation that the provisions of the general law have been complied with, is of a discretionary, and not of a ministerial nature, and cannot, therefore, be interfered with by injunction or mandamus.

[1] A second article has been prepared on this interesting branch of law, and will appear in our next number.—*Eds. Am. Law Reg.*

2. The commissioners named in a special act of incorporation under the general railroad law having, as was alleged, acted, in taking the subscriptions to the stock of the company, in a fraudulent and illegal manner, a bill was filed on behalf of persons who had been thus prevented from subscribing, to restrain the promoters of the company from applying for letters patent, and from proceeding to organize the company by the election of officers and otherwise, and also to have the former subscriptions declared void, and the commissioners directed to open a new subscription, and for these purposes an injunction was appplied for. The Governor in the meantime granted the letters patent, which fact was alleged in a supplemental bill. The injunction was refused by the court, on the ground, that it was too late to prevent the issuing of the letters, and that to prevent the further organization of the company would amount to a forfeiture of the charter, which could only be done at law by *scire facias* or *quo warranto*.

3. Where the original bill is for any reason fatally defective, it cannot be made the basis of a supplemental bill.

This was an application for an injunction to restrain the defendants, commissioners named in an act of Assembly incorporating the Philadelphia City Passenger Railroad Company, from making application to the Governor for letters patent, and from further proceeding with the organization of said company. The particulars set forth in the bill filed, and the nature of the relief prayed for, will more fully appear in the opinion of the court, which was delivered by

LUDLOW, J.—This bill is filed against the defendants, commissioners named in an act of Assembly entitled "An act to incorporate the Philadelphia City Passenger Railway Company." The bill sets forth the fact that the commissioners proceeded to the discharge of their duties, according to the terms of the act of Assembly by virtue of which they assumed to act, and then charges that the complainant was prevented from subscribing to the stock of the company by reason of the fraudulent acts of the commissioners, who had conspired to defraud the complainant and the public, first, by selecting an office for receiving the subscriptions located in an unusual place, inaccessible and unsuited to the proper performance of the duties of the commissioners; and secondly, by stationing upon the stairway and entrances leading to the office an organized gang of men, so as totally to preclude the access of the public to the room until the whole of the stock of the company had been sub-

scribed for. The bill then prays the court to declare the subscriptions already made fraudulent and void, and to direct the commissioners to make and receive new subscriptions in such manner and place as the court may direct.

The bill further prays for the interference of the court by injunction, and that the defendants may be restrained from making application to the Governor of the Commonwealth for letters patent, and from holding an election for directors, or from further proceeding with the organization of the company, either as commissioners or corporators, or as subscribers to or holders of the stock.

The very grave questions thus presented for our consideration will require us to review the various acts of Assembly incorporating the railway company, to investigate the merits of the case as disclosed upon the bill and affidavits presented upon the hearing of this motion, and to examine the various questions of law involved in the proper adjudication of the cause.

A review of the legislation which has brought this company into existence will exhibit a history as interesting as it is extraordinary.

The original act of incorporation passed the Senate and House of Representatives upon the same day, to wit: the 23d of March last; the Governor disapproved of the act, and returned it to the House in which it originated, with his objections.

Upon the 25th of March, notwithstanding the Executive disapproval, the bill passed the House of Representatives by the constitutional vote, and on the 26th of March, the bill having been sent to the Senate, also passed that body by a similar vote, and thus became a law of the State.

The act contains many sections not unlike those in other acts incorporating railway companies, but it entirely omits an important section, or clause of a section, which has been inserted in other acts, and which provides, "That before the railway company shall commence to use the said streets, *the consent of the Councils of the city of Philadelphia shall be first obtained.*"

Subsequently to the passage of what may be called the organic law, a supplement was introduced materially affecting the provisions of the original act, passed both branches of the legislature, and

received the Executive approval on the 31st of March, 1859. This supplement contains such remarkable departures from the provisions of the general railroad law of 1849, and also from the provisions of the act to which it is a supplement, as to call for a moment's examination.

By its first section it repeals the provisions of the general railroad law, requiring that twenty days notice shall be given by the commissioners therein named, of the time and place of opening books and receiving subscriptions for stock; and declares that *three* days or more, at the option of the commissioners, shall be the time required.

It authorizes the commissioners to *make* as well as receive subscriptions for the stock.

By its second section it grants "*the exclusive right to use and occupy for railroad purposes*" the streets, (Chestnut, Walnut, Front, Twenty-second, and Sixty-fifth,) and directs that the road shall be built with the form and gauge, and in the manner and mode already adopted by the Frankford and Southwark Passenger Railway Company, then places the construction of the road under the direction of the Chief Engineer of the city, and concludes as follows: "And so much of any law or ordinance as requires the proposed place, courses, styles of rail, and manner of laying the same, to be approved by the Board of Surveys and Regulations of said city, and all laws conflicting or inconsistent with this supplement, be and are hereby repealed;" thus, among other things, repealing the 5th section of the act to which this is a supplement, and which provides "that the said Councils (of this city) may, from time to time, by ordinance, establish such regulations as may be required for the paving, repairing, grading, culverting, and laying of gas and water pipes in and along said streets and avenues, and to prevent obstructions therein."

We have thus briefly viewed the legislation by virtue of which a company is to be created, because an intelligent comprehension of the questions of law hereafter discussed renders it necessary for us so to do.

If, however, upon the merits of this case, we have a serious doubt, that doubt would be fatal to the present application, and we must,

therefore, examine the facts as presented by the affidavits submitted.

The affidavits presented by the complainant establish the fact that an organized gang of men took possession of the stairway leading to the room occupied by the commissioners, that this gang had been marshalled for the purpose long before daylight on the morning of the 8th of April; that it was impossible for the public to reach the rooms of the commissioners until the whole of the stock had been taken; that the leaders and members of this organized gang partook of refreshments in a room, which must have been under the immediate notice of the commissioners, and free of charge, and that orders were communicated to this body of men from a room immediately adjoining that in which the commissioners sat.

The facts thus sworn to by the complainants' witnesses are substantially uncontradicted by any evidence in the case.

The defendants and each of them deny any confederacy or agreement, either directly or indirectly, with any person or persons whatever to do, or cause to be done, any illegal act or thing; and further, that the stock was not distributed by them in pursuance of any previous agreement or understanding, and yet they do not so contradict certain material facts contained in the affidavits of complainant as to bring us to the conclusion that the commissioners, or some one of their number, had not a knowledge of or did not indirectly consent to the transactions by which the public were excluded from the room in which the commissioners sat.

The commissioners, except one of them, and six subscribers for the stock of the company not commissioners, were together in the room at a very early hour upon the morning in question. Now the commissioners might have feared that unless they entered the office at an early hour entrance might thereafter become almost impossible; but this by no means explains the presence of the six subscribers, who have submitted their affidavits, nor of the six subscribers who have not submitted their affidavits, and who must also have been in company with the commissioners. I say they must have been with the commissioners, because, with the exception of those who subscribed for this stock, no person reached the room

in which the book was open, until after all the stock was taken, and the evidence is uncontradicted, that when the book was first opened the gang had possession of the stairway. One of the commissioners, Mr. Grove, reached the house at a later hour than his co-commissioners, and the evidence is again uncontradicted, that he was at once admitted to the room in the second story of the building, and that the stairway was at that time in possession of the gang. True, Mr. Grove says that his way was unobstructed, and that he did not know the persons upon the stairway, but Kneass explains the whole matter when he says that they, the gang, were directed, when Mr. Grove appeared, to admit him at once and without obstruction.

When the commissioners organized, they requested all persons not commissioners to leave the room, which they accordingly did, by walking into an adjoining room; now at this time the gang had possession of the stairway, and we cannot believe that this was not the case, otherwise some person or persons, not subscribers, would have been produced, who could have sworn to a state of facts which would have rebutted the idea of an organized resistance to the admission of the public.

One of the commissioners swears that *when the public had ceased to take the stock* the book was handed to the commissioners to enable them to subscribe; the affidavits of several witnesses establish the fact that a number of persons endeavored to reach the second story of the building, but were prevented from so doing; now the public could never have ceased making a demand for this stock while the book was open, and before it was handed to the commissioners, unless some obstruction prevented the accomplishment of that design; and if the statement of the commissioners is true, the explanation is, that the stairway being blockaded at the time the stock was being subscribed for, the demand of the public ceased, and that, too, before the whole of the stock was subscribed for. One of the subscribers attributed his success to his superior powers of endurance, but the evidence shows that his only competitors were the commissioners and the other successful subscribers who were with him in the second story room, at an early hour in the morning, *before* the gang took possession of the stairway; and this conclusion is strengthened by

the testimony of the commissioner just referred to, who says, the public demand ceased—that is—in time to allow the commissioners to subscribe to a large amount of the stock.

Having thus brought the commissioners and the successful subscribers together, and remembering that no person reached the commissioners' room from a very early hour in the morning, except Mr. Grove; (whose admission has been explained) we are not surprised to find that of the 10,000 shares of stock to be taken, 3,100 shares were subscribed for by the commissioners, 3,300 by the commissioners as attorneys for various persons, 700 shares by a son of one of the commissioners, and the balance was divided among the individuals who had, by an extraordinary coincidence, reached the room at a very early hour in the morning, and at or about the time the commissioners assembled, *and before the gang took possession of the stairway*. Now, when it is remembered that the leaders of this gang sat and drank at a table spread in the room adjoining that in which the commissioners sat, and were passing and repassing in and out of this room, how is it possible to believe that all of the commissioners were ignorant of this state of things, and if not ignorant, they, or some one or more of them countenanced and supported, and thereby became parties to the acts of those upon the stairway, (even supposing no preconcerted arrangement existed) in such a way as to require us to afford a remedy for the wrong committed, if we have power so to do.

With this view of the facts of this case as presented by the affidavits, it becomes our duty to determine the rights of these commissioners, so far as their power to subscribe for the stock of the company is concerned, for if, by the supplement to the original act of Assembly, they have the legal right to absorb the whole stock, then neither can the complainant nor the public object. We therefore confine our attention exclusively to the supplementary act, for it cannot be doubted that, by the terms of the original act, the power now referred to does not exist. By the letter of this supplement, the commissioners may "*make* and receive subscription," and in our interpretation of the act, we must be governed by the general rules of law applicable to the construction of statutes,

by the law as it stood prior to the passage of the supplement, and by the language of the act itself. Everything which is within the intent of the makers of the act, though it be not within the letter, is as much within the act as if it was within the letter and intent also. *Walker* vs. *Deveraux*, 4 Paige, Ch. 252; *Stowell* vs. *Lord Zowch*, 1 Plow. 366; Dwarris on Stat., 691; and when the intention of the law is doubtful and not clear, the judges ought to interpret the law to be what is most consonant to equity and least inconvenient. *Kerlin's lessee* vs. *Bull*, 1 Dal., 191.

And in the construction of a statute granting privileges to individuals, when there is an ambiguity or inconsistency in the language of the grant, if one construction bears against the public trade and public convenience and another abridges the grant, that must be adopted which favors the public convenience and trade. *Stormfeltz* vs. *The Manor Turnpike Company*, 1 Harris, 560.

Keeping these principles in view, let us examine the law as it stood prior to the passage of this supplement. Two of the judges of the Supreme Court at Nisi Prius have already so clearly stated the law, that it will be necessary simply to refer to their opinions upon this point. Judge Woodward, in *Martin Thomas* vs. *The Citizens Passenger Railroad*, says, "the commissioners acted under the provisions of our general railroad law of 19th February, 1849. The policy of that law is opposed to monopolies. It makes railroads incorporated under it public highways for purposes of transportation and travel, and it throws open the stock of new roads to the public in the fullest and fairest manner."—MS. June 15th, 1858. In *Brower* vs. *The Passenger Railroad Company*, Judge Strong says: "I concur fully with what was stated by Mr. Justice Woodward in *Thomas* vs. *The Citizens Passenger Railroad Company*, in regard to the policy of this enactment."

This, then, being the well settled interpretation of the statutes relating to the subject under consideration, can the words of this supplement alter the law? we think not, because the act simply confirms a right which, under the old law, the commissioners possessed, because at best there is an inconsistency in the terms of the act which, under the construction contended for by the counsel for

defendants, would enable them to exclude the public, and yet which in plain language directs the commissioners to advertise and give at least three days notice of the time for the opening of the books, and for subscriptions to be made for the stock of the company.

The interpretation contended for by defendants would, in a case of ambiguity and doubt, oblige the court to give a judicial sanction to a most odious feature of a law which at best creates a dangerous monopoly, and thus destroy the rights of the public and not maintain them, which we are bound, if possible, to do. 1 Harris, 560.

But the commissioners, if they enjoyed an exclusive privilege, have waived it by assuming to discharge their duties as public officers, and in a public manner, and by so doing, every principle of right requires them to act in good faith to the public.

Having thus disposed of the rights of the commissioners, and believing, as we do, that a wrong has been inflicted upon this complainant and the public, we are next to consider whether a remedy exists, and if so, whether it is to be applied through the instrumentality of courts administering the common law, or whether a Court of Chancery can, in the exercise of its well settled powers, afford the desired relief.

There is an important fact developed by the testimony in this cause, of which we must take judicial notice, to wit: *the actual existence of a corporation* created by the letters patent issued by the Governor of the State, in the name and by the authority of the Commonwealth, and it matters not, in our view, whether these letters patent were issued by the Executive before or after the bill was filed in the case, for the bill, as filed, makes the commissioners *alone* defendants, and, as the Governor has not been made a party to this bill, (even if the legal right so to do existed) the process of the court could not, in any contingency, *prevent* the issuing of the letters patent.

A corporation, therefore, in fact exists, and unless we possess the power to declare the act of the Governor null and void, and thus destroy the corporation, we cannot grant the present motion.

What, then, was the nature and extent of the power delegated to

the Governor under and by virtue of which the letters patent have been issued?

The act of 1849, known as the general railroad law, directs that the Governor of the Commonwealth shall grant letters patent when the commissioners certify that certain provisions of that law have been complied with. This act is not unlike others devolving upon the executive similar powers; as an illustration, we may refer to the general banking law, which confers upon the Executive powers precisely similar to those exercised in the present instance. Purdon Dig. 71, p. 11.

Can it be contended that when the legislative branch of the government has devolved upon the executive of the State duties of so responsible a nature, that that officer, representing, as he does, an independent branch of the government, is to execute them simply as a *ministerial* officer, and can exercise no discretion in the premises? This principle can hardly be maintained, for be it observed, the Governor of the Commonwealth is as much bound by his oath of office, to execute the laws of the commonwealth with fidelity, as any officer of either of the co-ordinate and also independent branches of the government, and to deny to him the right to exercise a sound discretion, is to make him the convenient instrument through and by means of which the grossest frauds might with impunity be perpetrated.

As an illustration of this principle, we will suppose that these commissioners had received the subscriptions for the stock of this company at the dead hour of the night, and in open and notorious violation of the organic law of their existence, can the proposition be successfully maintained that the Governor of the Commonwealth, as a ministerial officer, would be compelled to issue the letters patent, and thus legalize a fraud.

Would the Supreme Court, even if they assumed the power to grant a writ of mandamus, oblige the Governor, under such circumstances, to proceed to the execution of the letter of the law; if they would not and could not do so, then the only alternative is to recognize the existence of a discretionary power vested in the executive, and

to be exercised according to the dictates of his own conscience and judgment.

The Supreme Court have in substance asserted a principle in entire accordance with the views now suggested, in a reported case. In *Griffith* vs. *Cochran*, 5 Binn. 87, an application was made to the court for a *mandamus* to compel the Secretary of the Land Office to prepare and deliver land patents. Ch. J. Tilghman, in his opinion delivered in that case, says: "The Secretary of the Land Office may have reason to think that there has been something wrong in the conduct of the applicants for the land, or of the Deputy Surveyor, or other officer; and in such a case, it would be his duty to stop the calculations, until the matter is decided by the (property) board. If the Secretary had refused to make any calculations, or to take any step whereby the business of the applicant might be despatched, it would certainly have been our duty to compel him by mandamus," and it will be seen by a careful examination of this case, that there is a well-defined distinction recognized by the court between a mere ministerial act and a ministerial act coupled with a duty, and which involves the exercise of a discretionary power.

If, then, the Governor is vested with discretionary power, a great public duty devolves upon him; and in the execution of this duty, he may, if fraud exists, apply a most effective remedy, by arresting the progress of the fraud, and by a refusal to issue the letters patent, protect the rights of individuals and the public.

A proper respect for a co-ordinate branch of the government will not allow us to presume that the Governor deliberately refused to examine into the circumstances attending the discharge of the duties by the commissioners, defendants in the bill; had he been brought to the same conclusion upon facts presented, as we have been obliged to arrive at, we doubt not that he would have refused the letters patent; and even had he neglected so to do, we could not for that reason grant the relief prayed for in this bill, unless upon principles of equity of the most indisputable character, our duty obliged us to interfere.

The letters patent having been issued by the Governor, is there no other remedy existing by which the Executive himself may destroy the existence of this corporation, or attempt so to do, if it shall appear that the letters patent have been *unadvisedly* granted? Most undoubtedly, for the law provides the method, and the Executive may wield the power necessary to employ it. A corporation is an artificial body, constituted of several members, united by its franchises and liberties, which form its ligaments and essence. Lilly's Pr. Reg. 459. The Legislature of Pennsylvania may establish a corportion, that is, grant out a portion of the sovereign power of the State, and the corporation exists by virtue of a constitutional exercise of sovereign power. *Murphy* vs. *Farmers' Bank Schuylkill County*, 8 Harris, 419. And the Governor of the Commonwealth may direct his Attorney-General to test the validity of any letters patent, and submit to the proper judicial tribunals the question of fraud for their determination. *Murphy* vs. *Farmers' Bank Schuylkill County*, id. 419, if fraud exists, the fact is thus judicially determined. The question is presented at the suggestion of that branch of the government whose peculiar duty it is to see to it, that the sovereign power of the people is not abused, and it is determined by an appeal to another and entirely independent branch of the government, the judicial, whose peculiar provision it is to expound questions of law, and by its appropriate machinery resolve questions of fact. Thus, by the harmonious action of the different departments of the government, the interests of the people are protected; while by a departure from these obvious rules, a collision is produced, which must inevitably destroy the rights and sovereignty of the people, and eventually the government itself.

We can readily conceive of a question of fact being presented to the consideration of the Governor, connected with the issuing of letters patent, so embarrassed by conflicting testimony, as to render the satisfactory solution of it a matter of very great doubt and uncertainty. In such a case, for the executive to deny the letters patent, would be to assume a power which would destroy a right, without the intervention of a court and trial by jury; whereas, we have shown that the executive may grant the letters and *eo instanti*

direct his attorney-general to test by the judicial proceedings hereafter to be noticed, the question of fraud.

With the Governor of the commonwealth the responsibility rests, unless a court of chancery can interfere in the summary manner now invoked.

Has, then, a court of chancery the jurisdiction contended for? Let us examine this question.

It is an elementary doctrine, that courts of equity are governed by as well defined principles as courts of common law jurisdiction; they afford an effectual remedy, when the remedy at common law is imperfect, but they do not, as has sometimes been erroneously supposed, create a right which the common law denies; they give effectual redress for the infringement of existing rights, when, by reason of the special circumstances of the case, the redress at law would be inadequate. Adams' Eq. 50—58.

To ascertain the jurisdiction of a court of equity, we must be governed not only by general principles, but by established precedents both at law and in equity, for they contain the opinions of experienced and learned jurists; and if, upon the one hand, we discover a complete and adequate remedy at law, and upon the other a total denial of jurisdiction in a given class of cases, it would be an usurpation of power for us to seize a jurisdiction, in order to reach a wrong perpetrated in a particular case.

Is there, then, in this instance a complete remedy at law, or a remedy in its nature legal?

In England, when the crown has unadvisedly granted letters patent which ought not to have been granted, the remedy to repeal the charter is by *scire facias*, 2 Black, 348; 3 id. 261, and authorities cited; and if the crown grants the same office by letters patent dated on two consecutive days, the last are merely void, yet the patentee of the first letters patent must bring *sci. fa.* in order to avoid them by a judgment of the court. Grant on Corporations, p. 40, and authorities cited. And the better opinion seems now to be that the *sci. fa.* in this last case must issue upon the fiat of the attorney-general; and although the writ of *scire facias* is the proper remedy where there is an existing legal body capable of

acting, but who have been guilty of an abuse of the power entrusted to them, yet it cannot be doubted that an information in the nature of a *quo warranto* will reach that corporation, which is a body corporate *de facto*, but which takes to itself to act as a body corporate, but from some defect in its legal constitution cannot legally exercise the power affected to be used. *Rex* vs. *Passmore*, 3 T. R. 244, 245; *Regents of University of Maryland* vs. *Williams*, 9 Gill & Johns, 365; *Attorney General* vs. *Utica Insurance Company*, 2 Johns. Ch. 371; *Slee* vs. *Bloom*, 5 Johns. Ch. 380.

Nor can the existence of a corporation be attacked indirectly; if its life is to be taken, its vitality to be destroyed, it must be done by proceedings instituted directly against the corporation.

So exceedingly careful has our own Supreme Court been upon this point, that in *Hibernia Turnpike Co.* vs. *Henderson*, 8 S. & R., 223, although the court held that the commissioners could not dispense with the payment of a certain sum specified in the act of incorporation, and that if they permitted a subscription to be made without such payment, the contract was void, and the company could not recover the amount which ought to have been paid, the chief justice expressly avoided any insinuation against the validity of the charter, and Judge Duncan, in *Kishacoquilas and Centre Turnpike Railroad Company* vs. *McConaby*, 16 S. & R., 145, comments upon the case last cited, and broadly affirms the general doctrine to be, that a charter *fraudulently* obtained cannot be forfeited or *repealed*, except by *scire facias* or information in the nature of a *quo warranto*.

These, then, being the remedies intended to reach the class of cases to which this belongs, it is not surprising that we have searched in vain for a principle or precedent which would enable us to grant this motion, for while courts of chancery will hold corporations accountable in a great variety of cases for breaches of trust, it cannot, either directly or indirectly, divest corporations of their corporate character and existence.

Accordingly chancery never deals with the question of forfeiture. *Slee* vs. *Bloom*, 5 Johns. Ch., 380; *Attorney General* vs. *Earl of Clarendon*, 17 Ves. 491; *King* vs. *Whitemarsh*, 5 Term Rep., 85;

Attorney General vs. *Utica Insurance Company*, 2 Johns. Ch., 376; and in the State of New York, the late Chancellor Kent, who administered the duties of his high office with distinguished learning and wisdom, and with an experience unsurpassed by that of any other American equity lawyer or judge, never exercised or attempted to exercise such a jurisdiction, and it was at length conferred upon courts of chancery by statute. N. Y. Rev. Stat. 581, 583.

If chancery never interferes in questions of forfeiture, shall it go one step further, and assume to *repeal* an existing charter? Such a principle never has been asserted, nor can the most diligent search discover such a precedent. The nearest approach to it may be found in an expression of Chancellor Kent, in *Haight* vs. *Day*, 1 Johns. Ch., 18, when he expressed the opinion that commissioners acting fraudulently in the apportionment of stock, may be controlled by judicial proceeding, but he abstains from any expression of opinion upon the nature of the remedy to be applied. And Chancellor Walworth, in *Walker* vs. *Deveraux*, 4 Paige Ch. 246, points out a remedy, when he says, "if the apportionment of stock was absolutely void, he (the complainant) has mistaken his remedy, he should in that case have applied to the Supreme Court for a *mandamus*." That is, the complainant cannot ask for the interference of a court of equity, he must go to a court of law; *for any jurisdiction possessed by chancery can only be in aid of or ancillary to a remedy at law.*

Nor can the supplemental bill filed in this case extend our jurisdiction; for apart from the fact that it is filed against the corporators, and not the commissioners, if the original bill is fatally defective, and we could not make a valid decree upon it, it cannot be made the basis of a supplemental bill. *Chandler* vs. *Petit*, 1 Paige, 168; *Bank of Kentucky* vs. *Schuylkill Bank*, 1 Pars. Sel. Eq. Ch. 214.

The letters patent having been issued by the governor, we will not, under the prayer of this bill, now interfere with the corporation, and although the defendants may, if the circumstances of the case warranted it, be punished for a contempt for having applied to the Governor of the State for letters patent after bill filed and cautionary order, that punishment could not afford the relief which the

complainant seeks, and to grant the last prayer of the bill, and thereby restrain the defendants from organizing the company, would be to destroy the corporation itself, which in this proceeding we have no power to do; should we assume the power, we have already shown that we would prevent, by the order of a court of chancery, the defendants from the performance of a duty, which upon the common law side of our own court we would by *mandamus* compel them to perform.

The further consideration of the other points presented on the argument of the cause becomes now unnecessary, and, in conclusion, we can only say that, while, with our view of the facts of this case, we would consider ourselves obliged to afford relief, our view of the law, as administered in courts of equity, obliges us to deny the motion; to grant it would be to usurp a jurisdiction which we do not possess. There is, however, a satisfaction in knowing that the letters patent can be repealed, and the corporation destroyed, by a proceeding at law, to be instituted by the attorney general of the commonwealth.

The motion for a special injunction is refused.

In the District Court for the City and County of Philadelphia.

RICHARDS' ADMINISTRATOR *vs.* DAVIS.

1. A pledge for a loan of money to be repaid at a *fixed* time, may be sold by the pledgee, after the time for redemption has gone by, and a demand for repayment duly made, provided reasonable notice be also given to the pledger, of the time and place of the intended sale.
2. The law is the same where the pledge is a promissory note of a third person, when the note will not mature until long after the time fixed for repayment of the loan.

STROUD, J.—The matter in dispute in this case was referred, by agreement of the parties, to a referee, under the sixth section of the Act of Assembly relating to reference and arbitration, passed the 16th day of June, 1836.

On the hearing of the parties, the referee made an award, that there was due from the defendant to the plaintiff the sum of $331 and costs of suit.

By a statement, in writing, of the referee, it appears that, in the month of April, 1857, William H. Richards, Jr., the intestate of the plaintiff, being the owner of a promissory note for $1,100, dated April 4th, 1857, made by *M. E. J. C. Crees*, payable after four months to the order of *Morgan H. Jones*, and by him endorsed, and also endorsed by *Howard Tilden*, was desirous of selling, and for this purpose entrusted it to a friend, who employed *Edward S. Jones* as a *note broker*. *Jones* made an effort to sell the note, but met with no success. On the 22d of April, 1857, he *pledged* the note to the defendant for a loan of $490, to be repaid on the 2d of May, 1857.

The money so obtained was not repaid at the time stipulated, and on or about the 10th of May, 1857, Davis told *Jones* that he must come and pay the loan, or he would be obliged to sell the note. *Jones* begged for a few days' delay, but made no objection otherwise to the *defendant's* communication.

Subsequently, *the defendant* placed the note in the hands of a broker for sale, who, after the 20th of May, 1857, sold it for $800. After deducting a commission of $10, the broker handed the balance, $790, to the *defendant*. The *purchaser* of the note was *Tilden*, the endorsee. The referee finds that the sum for which the note was sold was the highest price that it would bring.

In June, 1857, a tender was made to the defendant, in behalf of the plaintiff's intestate, of all the money then due on the loan, and a simultaneous demand was made on the defendant to return the note. This request not having been complied with, the present suit was instituted to recover the value of the note.

The award of the referee was for the difference, with interest, between the $490 loaned to the plaintiff's intestate by the defendant, and the $790, the net proceeds of the note sold by order of the defendant.

The important facts thus presented are, that the pledge was a negotiable promissory note, endorsed by the payee, and afterwards

by a third person—the time for its redemption *fixed*, and this time would happen long before the maturity of the note. A demand for redemption was duly made by the pledgee—and a reasonable time after the demand for redemption having passed, without payment of the money loaned, the pledgee, through the agency of a note broker, sold the note for the best price which could thus be obtained for it. No notice of any kind was given to the pledger subsequent to the demand for redemption of the note. .

. The exceptions to the award of the referee require a consideration of the following propositions: 1. Whether, when the pledge is a *negotiable promissory note*, and actually negotiated, the pledgee is restricted, in the use of means to reimburse himself, to an action at law upon the promissory note—or whether a pledge of this description is subject to the same rules of law which apply to pledges of movable goods, stocks, and other securities not strictly negotiable.

2. Whether, where no special contract has been made between the parties, and the pledge being a promissory note, has not been redeemed within the appointed time and after notice to redeem has been given, the pledgee may sell the note, through the agency of a note broker, without giving notice to the pledger of the time and place of the intended sale, or of the name and place of business of the broker, and such other particulars as may be appropriate to the nature of the pledge.

The *first* proposition has been suggested by the 321st section of Story on Bailments. It is there said, "Where the pledge is a *negotiable security* (such as a negotiable note), the pledgee has a right to recover and receive the money due thereon, and to sue for it in his own name. But he has no right (unless, perhaps, in a very extreme case) to compromise with the parties to the security for a less sum than the sum due on this security; and if he does, he will be compelled to account to the pledger for the full value."

No other writer on this subject, it is believed, has made a similar statement. *Judge Story* refers to none. He relies entirely upon two reported decisions—*one*, *Bowman* vs. *Wood*, 15 Mass. R. 534; the *other*, *Garlick* vs. *James*, 12 Johns. R. 146.

Bowman vs. *Wood* was assumpsit by the endorsee against the

maker of a negotiable promissory note. The plaintiff, a deputy sheriff, having an execution against one *Hodge*, received from him the note in question as a pledge or collateral security for the discharge of the execution; the note being signed by the defendant, and endorsed in blank by *Hodge*. The plaintiff (the pledgee) kept it for two months, and then advertised it, as the property of *Hodge*, and sold it at *auction* to *himself*, as the highest bidder, of which he made return on the execution. The note was due when it was endorsed by Hodge, and transferred to the plaintiff as a pledge. Here the action was not between the pledger and pledgee. The pledger was the payee and endorser of the note, and the action was *upon the note*, against the *maker*. There seems not to have been any dispute as to the genuineness of the note, nor was there any lapse of time which could avail the defendant as a bar, nor any allegation of *mala fides*, in any respect, as to the conduct of the plaintiff to the defendant. The only defence which was open to the defendant, was *payment*. This was the view of the Court. "The note," it was said, "being negotiable, having been endorsed for a valuable consideration, and there being no proof that it has been paid, the plaintiff is, *of course*, entitled to recover."

This was the only point decided by the court. As the holder of a promissory note, given for value and endorsed and delivered for value, the plaintiff had, *prima facie*, a good cause of action, which nothing offered by the defendant conduced at all to overcome.

The plaintiff had given evidence, it would seem, of the facts, that he had obtained the note of the endorser as a *pledge*, and had afterwards advertised and sold it as the property of the *endorser*, under the execution which had been put in his hands against him, and that he had become, *as he supposed*, the purchaser of the note in that way. But the court declared this procedure had conferred no title to the note.

In reference to the transfer of the note by the endorser to the plaintiff, as a *pledge*, the court used the language, "having received it as a *pledge* for the payment of the execution, he must account to the endorser for the proceeds."

This remark is the only ground which this decision affords for

the broad principle of the text in the law of bailments. And this remark, though true, was manifestly *extra-judicial*, and, consequently, possessed no binding force, even on the court that made it.

It is plain that, whether the plaintiff's title to the note was derived from the endorsement and delivery by *Hodge*, or from the pretended sale on the execution, it was of no importance as a *defence* to the *maker*. The case therefore determines nothing, nor does the opinion even *extra-judicially* express anything which substantiates the main principle of the text.

Garlick vs. *James*, undoubtedly involved the consideration of the law relative to the power of a pledgee and the mode of proceedings to enforce payment of money for which the pledge was given. The action was brought by the *pledger* against the *pledgee*. The declaration is a special one, claiming damages for the abuse by the pledgee of his power over the pledge, and the pledge was a *negotiable promissory note* which had several years to run *before* maturity.

The note bore date November 1, 1802, was for $600, payable on November 1, 1807. The maker was *Seth* Garlick, and the payee *Samuel* Garlick, the plaintiff. On the 29th of January, 1803, the plaintiff being indebted to the *defendant James*, in the sum of 300 dollars, the *plaintiff* pledged this note to the *defendant*, to secure the debt due by him and a co-debtor. *No time was* FIXED *for the redemption of the pledge.*

The defendant retained the note until some time in 1810, when he gave it up to the *maker*, receiving in exchange a note for $300 of a *third* person. This latter note was subsequently paid to the defendant. It was testified by *Seth* Garlick, the *maker* of the note pledged and afterwards surrendered, that he was at the time and continued to be abundantly able to pay the whole amount ($600) of the pledged note.

It is stated in the opinion of the court, not only that the pledge was for an *indefinite* time, but that the pledger *was never called upon to redeem.*

The pledge, consequently, had never been forfeited, and it had been given up to the maker, abundantly able to pay the whole

amount on its face, in exchange for a note for *one-half* of its value. The point for which the decision of the court is referred to by *Judge Story*, did not arise in the case.

It would involve no inconsistency to acquiesce in the principles and in the very points of both these decisions, and at the same time withhold assent to the proposition in the law of bailments.

Where, as in *Bowman* vs. *Wood*, the promissory note was due when it was pledged, and could therefore be sued upon immediately, there might, perhaps, be some reason to infer, in the absence of any agreement to the contrary, that the purpose of the parties was to restrain the pledgee to an action upon the note. For this course would be open to him although the time of redemption had not yet arrived, and even might be quite distant. But that a pledge of this kind is subject to the same law, where the time for redemption is *fixed*, and must happen *long before* the maturity of the note, and consequently long before a suit can be brought upon it, has neither reason nor convenience to recommend it. Practically such a law would render the obtaining of a loan on *such* a pledge, impossible.

We find, therefore, no ground of exception to the award on this score.

But the opinion of the referee went beyond this question, and decided that it was *not* a part of the law of pledge, that notice should be given to the pledger, of the *time* and *place*, when and where, after the period for redemption of the pledge had passed, the pledgee intended to sell or otherwise dispose of the pledge in order to reimburse himself.

The chief ground of this opinion seems to have been the instructions to the jury in *De Lisle* vs. *Priestman*, 1 P. A. Browne's Rep. 176.

It is not necessary to narrate particularly the facts of that case. It is enough to say, that the action was brought by the *pledger* of a large number of shares of stock in an Insurance Company, to recover damages of the pledgee for a refusal to *re*-transfer such stock which had been assigned to him at the giving of the pledge.

The concluding part of the charge of the judge who presided on the trial was, "if you think, upon a view of the whole evidence, the

stock was pledged for an *indefinite* period of time, and sold without notice to the plaintiff, your verdict should be in his favor, for such damages as in your judgment he ought to recover. *But if you think the stock was pledged for a* FIXED *period of time, your verdict should be for the defendant.*

Upon the first branch of these instructions there is a general agreement, in the authorities, with the ruling of the court, and as the jury found that the pledge had been made without an agreement *fixing* the time for the repayment of the loan, the directions upon the *second* branch become of no importance to any one concerned in the cause.

It is quite clear, we think, that the court fell into a mistake on the second branch of the charge, which related to a pledge made on a loan to be repaid at a *fixed* time.

As early as 1714, a decision was made by the *House of Lords*, on a state of facts which presented this very point.

There are two reports of this decision: one in 1 Peere Williams, 261, entitled *Tucker* vs. *Wilson;* the other in 1 Brown P. C. 494, where the names are *Wilson* vs. *Tooker, adm'r of Thynne.* The names ought to be given as *Brown* has given them. His report is more precise and full in the statement of the case, and the argument of counsel is at greater length, and goes more into details in reference to the facts. *Wilson* lent to *Thynne* a large sum of money, for which *Thynne* assigned to him certain *exchequer annuities*, and at the same time *Wilson* gave a defeasance, covenanting, on repayment of the money lent and interest on a *named* day, he would re-assign the annuities to *Thynne*, &c. The time *fixed* for the re-payment of the loan was January 8th, 1709. In April, 1710, *Thynne* died without having paid any part of the money which he had borrowed, and *Tooker* received letters of administration with the will annexed, &c. *Wilson* repeatedly requested the re-payment of the loan, but without success, when, according to *Brown*, "by a letter dated the 24th of March, 1711, he gave notice to *Tooker*, administrator of *Thynne*, that he would proceed to sell the *annuities*, at the *Exchange*, on *Wednesday*, the 2d of April then next, and desired him to attend at that time, to see that

they sold for the highest price the market would then yield. But when the day came, *Tooker* desired a postponement of the sale to the *Monday* following, and underneath an attested copy of *Wilson's* letter of notice, wrote the following words: "Mr. Wilson, I desire you would suspend the sale of the annuities till *Monday* next, and you will very much oblige your very humble servant,

JAMES TOOKER."

"The money not being paid, nor any further delay requested, the annuities were, on the 7th of April, 1712, sold by an eminent bro- broker on the *Exchange*, for the highest price which they were then worth."

This narrative is taken almost *verbatim* from *Brown's* report. In his preface, he takes credit to himself for "*a particular attention to dates*," and this report certainly affords a good illustration of his *precision* in this respect.

On a *first* perusal of *Brown's* report, giving him credit for *accuracy* as well as *precision*, in his dates, the proper conclusion seemed to be that at least *a year* had intervened between the time fixed by *the notice* of the *lender* to the administrator of the *borrower*, for selling the annuities and the *actual* time of the sale. On close examination, however, of other parts of his statement, and especially of *facts* contained in the *argument* of counsel, it seemed clear that this could not have been so—that the sale *must* have taken place at or about the *time*, whatever that was, to which it had been postponed at the solicitation of Thynne's administrator.

The *Almanacs* of 1712 showed that April 2d of that year fell on *Wednesday*, which was named in the letter of March 24, 1711, as the time of the *intended* sale; the *next* Monday, to which *Tooker* had requested a postponement, would be *April* 7, 1712,—the very day on which *Brown* states that the sale took place.

The *apparent* discrepancy in the dates is entirely removed by the fact, (which one living at the present day may be excused for not reverting to at once,) that at the period of these transactions the *legal* year began on *March* 25, and consequently that March 24, 1711, (the date of the original notice by the lender,) was the *last* day of that year; and of course April 2, "*then next*," as the notice

said, was April 2, 1712,—and *five* days future, would be *Monday*, April 7, 1712—THE ACTUAL DAY OF THE SALE.

The case, therefore, as reported by *Brown*, in so far as the facts are important, furnishes clear evidence that not only was there a demand for re-payment of the loan, after the time *fixed* for that purpose had gone by, but an exact notice of the *time* and *place* of the *intended* sale was given by the lender to the borrower, *and that this notice was strictly complied with in the actual sale.*

It was determined *by the House of Lords*, that the course pursued by the pledgee was a proper one, and the sale valid.

On the trial of *De Lisle* vs. *Priestman*, this decision of the House of Lords appears to have been cited by the counsel of the defendant. It is manifest, therefore, that the decision was not rightly apprehended, for there was no pretence that the defendant had given notice to the plaintiff of his intention to sell the stock at a particular time and place, and consequently, instead of aiding the defence, its plain effect was directly the other way.

Peere Williams' report was *that* cited in *De Lisle* vs. *Priestman.* In general, he is to be regarded as an accurate reporter. But in the case in the House of Lords—*Tucker* vs. *Wilson*, as he has it—his statement, on the important point whether the sale of the pledge took place on the *day* appointed for the purpose, is calculated to induce the belief that there was *no* such correspondence. For having mentioned that there was a *fixed* time for the repayment of the loan, that it was not then repaid, he proceeds to say, "upon which the lender frequently desired the money, and gave notice that he would sell, and *appointing a time* for that purpose, desired the borrower to be present to see that the annuity was sold at the full value. The borrower, by letter, desired that the lender would stay a week longer before he sold, which was also complied with."

Thus far the statement is neatly and clearly given. But immediately following is this language: "And *then* the lender, *dying suddenly*, the defendant, *his administrator*, sold the annuity at the Exchange, by a sworn broker, for the full value that those annuities then sold for."

Here, by the interpolation of the words, "and then the lender, *dying suddenly*, the defendant, *his administrator*, sold the annuity," &c., the necessary inference is that the time to which the sale had been postponed, elapsed in *the life time* of the lender; that some time was taken up in procuring letters of administration, that the administrator then entered upon his duties, and without any *fresh* notice the annuities were sold by him.

We thus get from the whole statement the impression that the borrower, finding himself unable to repay the loan within the time for which he had solicited and obtained a postponement of the sale, abandoned the pledge, and afterwards the administrator of the lender sold it at his own convenience. If this were so, the facts would not warrant the opinion that a sale, to be valid, should be preceded by a notice to the pledger of the *time and place* when and where the pledge was intended to be sold.

From the way in which the case stood in the House of Lords, it is not, perhaps, a necessary conclusion, that the judgment of that tribunal depended upon the notice of sale given by the pledgee to the pledger.

The case was brought into the House of Lords on an *appeal* from the decree of *Lord Chancellor Harcourt*. *Lord Harcourt* decided that a pledge could not be sold by the pledgee, without a *foreclosure* of the right of redemption in chancery. The *House of Lords* reversed this decree. But it is to be borne in mind that on *appeals* the cause is regarded, essentially, as a proceeding *de novo*. Not only is a wrong judgment to be *reversed*, but a *right* one is to be entered. It was so in that case. The judgment of the House of Lords is set forth at length in *Brown*.

Chancellor Kent, both in *Hart* vs. *Ten Eyck*, 2 Johns. C. Reports, 100, and in his Commentaries, vol. 2, p. 582, speaks of "a reasonable previous notice to redeem," as a prerequisite to the sale. "This," he adds, "was settled in the case of *Tucker* vs. *Wilson*, and *Lockwood* vs. *Ewer*." And so the Supreme Court of Massachusetts states the law to be, citing the same cases which are referred to by *Chancellor Kent*, superadding the authority of his decision in *Hart* vs. *Ten Eyck*, and in the *Commentaries*. *Parker* vs.

Branker, 22 Pick., 46. Notice of the *time* and *place* of the intended sale of the pledge, is not mentioned as requisite by either of these eminent authorities, whilst both insist upon "a previous notice to the debtor to *redeem*" as indispensable, and a reference is made in both, to *Tucker* vs. *Wilson*, as the precedent for this opinion.

Why both these authorities should *infer*, from *Tucker* vs. *Wilson*, that it was indispensable on the part of the pledgee to give special notice to the pledger to *redeem*, and *pass over*, as if unimportant, the *notice of the time and place of sale*, can hardly be accounted for on any other supposition than that the latter subject was obscured by *Peere Williams*, and the dates of *Brown*, owing to the change in the calendar in 1752, not apprehended.

Each kind of notice is mentioned in the reports, and in the argument of counsel, contained in *Brown*, notice of the time and place of sale is distinctly mentioned as part of "the known and constant practice, in the case of mortgages of such securities, where the money has *been neglected to be paid* at the *time stipulated*, TO PROCEED TO A SALE ON GIVING EIGHT OR TEN DAYS' NOTICE."

And inasmuch as when a time for redemption is *fixed*, the borrower might well be considered as needing no further notice on that head, it would seem much more reasonable to dispense with this than to permit a *sale* of the pledge to be made without distinct warning to the pledger.

Judge Story is quite explicit and positive in requiring *notice of the sale* to be given. "He (the pledgee) may proceed to sell *ex mero motu*, upon giving due notice of his intention to the pledger." Law of Bailments, § 310. He does not, it is true, cite *Tucker* vs. *Wilson* for this, and the authorities which he does cite can hardly be said to bear him out. But he lays down the necessity of notice of the sale without any qualification, and the Supreme Court of New York, in *Stearns* vs. *Marsh*, 4 Denio, 227, covers the whole ground of notices, as well in respect to redemption as to the time and place of the intended sale. Both are held to be indispensable.

It may, perhaps, be asked, of what practical value can it be to the pledger of a *promissory note*, to be informed by the pledgee

that he has placed the note in the hands of a broker, to be disposed of by him in the usual manner of such securities.

When the pledge consists of *movable goods*, they are generally sold at *public auction*, after proper advertisement in the newspapers. And it is obvious enough that notice of the time and place of sale may be advantageous to the pledger.

Stocks, and similar securities, are sold at the brokers' board. Notice of the time and place may, unquestionably, be rendered serviceable to the pledger, who may influence his friends and others to give orders to purchase, which may insure the full market value.

The mode of selling *promissory notes* through the agency of a note broker, cannot, perhaps, be quite so readily turned to account by the pledger. Yet, as the name and place of business of the broker must be furnished to the pledger a reasonable time before the actual sale should be made, we are assured, by very competent authority, that the pledger may frequently advance his interest, by procuring friendly purchasers to apply to the broker, or by substituting other pledges better suited to the existing demands of the market, or by recourse to other legitimate expedients, which a shrewd and well informed broker with whom, *by the notice*, he may be put into communication, may suggest.

And whether or not such notice be likely, in general, to result beneficially to the pledger, the *chance*, whatever may be its worth, is his *right*, and a proper administration of the law demands its protection.

The first and second exceptions taken by the plaintiff are sustained, and the award set aside.

Award set aside.

In the Circuit Court of the United States.

PAUL T. JONES *vs.* THE FLOATING ZEPHYR. L. G. MYTINGER &c. *vs.* THE SAME.

Where a ship is detained in port by ice, and her cargo is damaged before the season allows her to proceed, though she subsequently delivers it to the consignees, a shipper cannot, without rescinding the contract, sustain a libel *in rem* for a breach of the bill of lading, until the term for the performance of the contract has expired.

These cases came into the Circuit Court on appeal from a decree in the admiralty in favor of the respondent. Both appeals involved the same questions, and were argued and decided together.

The libel, in the first case, was presented on February 28th, 1856; that in the second case was presented March 10th, 1856.

The libellants, respectively, alleged that in the month of December, 1855, they shipped on board the ship The Floating Zephyr, a foreign vessel, belonging to the port of Boston, but then lying in the port of Philadelphia and bound for Liverpool, a certain number of barrels of flour, to be carried to Liverpool and to be delivered there in good order and condition, to the order of the shipper, or to assigns (in the first case,) and (in the second case,) to Richardson, Spence & Co., or their assigns. Bills of lading, in the usual form, were signed by Shepherd Blanchard, the master of the ship, and part owner thereof. That the officers of the ship, in disregard of their duty, and contrary to the usage of merchants and of this port, received on board a large quantity of Indian corn, a portion of which was unsound, and all of which was improperly and defectively stowed, being placed in the hold, in layers under and over the barrels of flour. That the ship, by unreasonable delay in her sailing, became frozen up in her berth, and did not begin the voyage for a period of five weeks and upwards, during which time the corn gradually deteriorated by and under the influence of the heat of the ship. That the damaged corn was not discharged from the ship as it should have been, but was allowed to injure and destroy the flour. That on or about the 20th of February, 1856, the corn and flour were removed—spoiled and offensive—from the ship, by the order of the master; the flour being stored on shore, and so damaged by the heat as to be unfit for reshipment. That the performance of the contracts, in the bills of lading, was thus rendered impossible by the negligence of the officers of the ship. That the damage to the libellants arose from the unreasonable delay in sailing, the unfit condition of part of the cargo, and the defective stowage of the whole of it.

The answer of Shepherd Blanchard denied that the cargo was improperly stowed, or that the Indian corn was in an unsound con-

dition when received. The respondent alleged that the cargo was stowed in a customary and proper manner. That the ship was detained entirely by the ice; and that, while frozen in, precautionary measures were taken to prevent injury to the cargo. That on the 15th of February a survey was had. That on the 18th of February the respondent apprised the shippers by letters, of the condition of the cargo, but that they refused to co-operate with him in any measures for its safety. That the cargo was discharged in compliance with the recommendations of the surveyors. That on the 23d of February, at the instance of the consignees, a second survey was made. That in accordance with the opinion of the surveyors, the damaged flour was reshipped for transportation. That the voyage to Liverpool was not broken up, and the performance of the contract had not been rendered impossible by the negligence of the owners of the ship.

The Floating Zephyr sailed for Liverpool subsequently to the filing of the libels, and delivered her cargo to its consignees.

The District Court, after argument dismissed the libels.

The opinion of the Court was delivered by

KANE, J.—It is unnecessary to decide most of the questions that were argued so fully by the counsel in these cases. There is a difficulty in the way of the libellants' recovery, which is at the threshold, and is, as it seems to me, insuperable.

They were shippers on board the Zephyr. She was arrested at the wharf, after lading, by the ice of winter; and the libellants' goods were damaged before the season allowed her to proceed. She sailed, however, at the earliest practicable time, and delivered her cargo at its place of destination to the several consignees. These suits were instituted by the shippers on their bills of lading, while the vessel was still at her port of departure. It is obvious that they were instituted too soon. The ship is liable integrally for the damage sustained by the cargo during the voyage by reason of causes not excepted against in the contract of affreightment. But she cannot be libelled nor her owners sued *de die in diem*, as the voyage advances, and one item or circumstance of default and damage follows another. The contract is an entire one, and unless

it be rescinded, the recourse for a breach of it must be sought when the term for its performance has expired. The liabilities under it cannot be split up; Valin L. 3, T. 3 art. 9; 2 Boulay Paty, 390. To meet this objection, the libellants allege in argument that the voyage was broken up by the detention of the vessel, and the contract for carriage abandoned; and they liken the case of detention by ice, to that of detention by blockade, which according to the adjudication in 3 S. & R. 559, (*Stoughton* vs. *Rappalé*) is said to justify a rescission of the contract by the shippers. But without entering upon the question, whether the declaration of a blockade has this effect, which has been decided by many jurists, (see the opinion of Chancellor Kent in *Palmer* vs. *Lorillard*, 16 Johns, 348, and Valin's Commentary on the 8th article of title 1, book 3 of the Ordonnance,) it is enough to observe:—

First.—That the ground on which a blockade is supposed to have this effect, is simply the uncertainty of its duration, it resting in the discretion of an enemy, while the period of a detention by ice is ascertainable within reasonable limits, which must be understood to have been in the view of the parties a detention "par force majeure a cause d'un obstacle passages." Val.

Second.—The case referred to was a case of replevin; and it decides, not that even a blockade rescinds the contract of affreightment, but that it justifies a party in rescinding it. Now, in the cases before me, the parties have not claimed to rescind the contract; but on the contrary, they establish it by claiming damages for a breach of the bill of lading, which defines its terms; as their consignees also have done, by accepting the goods when they arrived out.

The libels must, therefore, be dismissed. I do not pass upon the question, whether there was defective stowage of the libellants' goods; nor upon the question of law which was pressed in the argument, whether the libellants could rightfully have reclaimed them, or can now claim damages for the injury they may have sustained, without exhibiting as evidences of their title all the parts of the bill of lading. The references to Abbott, 596; Valin L. 3. T. 3, art. 17, Emerigon Ass. ch. 11, sect. 3. § 7; and Boulay

Paty, 2 Do. Com. Mar. T. 7, § 1, would, however, suggest to this last question, a negative answer."

Mr. Paul and *Mr. Geo. M. Wharton* for the appellants (the libellants below,) made the following points:

I. The voyage was broken up, because,

1. The character of the article was changed by the fault of the carrier, before the departure of the vessel. It was no longer *flour*, but something else.

2. Of the lapse of time—a period of two months, and more—after the shipment of the cargo.

3. Of the entire discharge of the cargo.

4. Of the new voyage having been undertaken, merely by agreement, between the captain and certain shippers. The libellants refused to consent to the arrangements of those parties, with regard to the disposition of the cargo.

II. It was within the power of the libellants to consider the voyage as at an end.

Stoughton vs. *Rappalé*, 3 S. & R., 559; Valin Com. on art. 9. Pothier, Traite de la Charte Partie, part 1, sec. 4, Nos. 97, 98, 102; The Isabella, 4 Rob. 77; 2 Boulay Paty, 385, 6, Title 8, sec. 6.

III. Duty of the captain in regard to stowage; and the specific liability of the ship for the negligence or bad stowage of the master.

Flanders on Shipping, p. 214, § 200, etc., and cases cited; Abbott, 425; Curtis on Merchant Seamen, 213–14; *Clark* vs. *Barnwell*, 12 How., 273; *Rich* vs. *Lambert*, Ib. 347.

Flanders, 217, § 202. *Schooner Freeman* vs. *Buckingham*, 18 How., 183.

Brass vs. *Maitland*, 88 Eng. Com. Law, 470; Ibid, p. 476, note.

IV. The real owner must sue in the admiralty. The bare legal title will be disregarded as in equity.

V. Consignor must sue when he is the real owner of the goods.

Flanders, pp. 461–4, and cases therein cited; *Ludlow* vs. *Bowne*, 1 John, 1; *Freeman* vs. *Birch*, 1 Nev. & Mar., 420; *Davis* vs. *James*, 5 Burr., 2680; *Grove* vs. *Brien*, 8 How., 439; *Lawrence* vs. *Minturn*, 17 How., 100.

Mr. Kane and *Mr. Geo. W. Biddle* for the appellee, (the respondent below,) contended:

I. That the action was one purely *in rem*, and as such, was dependent upon the General Maritime Law. The Rebecca, Ware's Rep. 190, 191, 192; The Yankee Blade, 19 How., 89, 90.

II. That the contract in each case, in the bills of lading, was an indivisible one. It was still in force when the suits were instituted. The recourse for the breach of a contract must be sought when the term for its performance has expired. The vessel subsequently sailed; her cargo was delivered to the consignees. The suits were premature; 2 Boulay Paty, 390. *Logan* vs. *Caffrey*, 6 Casey, 196.

The parties here did not claim to have *rescinded* the contract. They treated it as still subsisting. They therefore cannot recover. *Goodman* vs. *Pocock*, 69 Eng. Com. Law, 576.

III. That these contracts are *terrean* rather than *maritime* in their character, and are therefore not within the jurisdiction of the admiralty.

IV. That the libellants were bound to exhibit, as evidence of their title, all parts of the bills of lading. Even if the voyage had been broken up, the title to sue, in respect to Mytinger & Co.'s shipment, was in the endorsees of their bill of lading.

As to the right of the endorsee or consignee to bring his action, they cited 6 S. & R., 429; Lord Raymond, 271; 12 Mod., 146; 8 Howard, 438; 17 How., 107.

V. That there was no evidence, in the cases, of bad stowage, or of negligence in the conduct of the master.

This point, however, was not much discussed by the counsel for the respondent, who relied mainly upon the questions of law comprehended in the four preceding points.

After the argument upon both sides had been concluded, GRIER, J. affirmed the decree of the District Court, dismissing the libels.[1]

[1] It may be proper to remark, that the decree of the Circuit Court must, for the present, be regarded as a contingent decision of these cases. The learned Judge will write an opinion only in case the libellants determine not to appeal to the Supreme Court of the United States. Should they conclude, by next October, not to bring the cases before that tribunal, *Judge Grier* will *formally* decide the important and interesting questions involved in them.

In the Circuit Court of the United States for the Southern District of New York—In Equity.

DENNING DUER *vs.* WILSON SMALL, RECEIVER OF TAXES, ET AL.

The statute of the State of New York, which provides that all persons doing business in the State of New York, as merchants, bankers or otherwise, and *not residents* of the State, shall be assessed and taxed on all sums invested in their business, the same as if they were residents of the State, is not in conflict with any provision of the Constitution of the United States.

The facts of the case sufficiently appear in the opinion of

INGERSOLL, J.—The complainant is a resident and citizen of the State of New Jersey, and has been such a resident and citizen since the month of January, 1855. During all that time he was, and still is, engaged in the business of banking in the City of New York, as a partner in the firm of James G. King & Sons. The defendant is the receiver of taxes in and for the City and County of New York.

The law of the State of New York provides that all persons doing business in the State of New York, as merchants, bankers, or otherwise, and not residents of the State, shall be assessed and taxed on all sums invested in their business the same as if they were residents of the State. Residents and non-residents, with respect to taxes on personal property invested in business in the State, are put on an equality.

The complainant was assessed and taxed upon his personal property invested in his said business in the City of New York, in the years 1855, 1856 and 1857. The amount of these taxes is about $1,400. He refuses to pay the same. He alleges in his bill that the law of the State of New York, the substance of which is above set forth, is in violation of the Constitution of the United States, and is otherwise illegal and void. He prays for an injunction restraining the defendant and others who may claim authority to act, from issuing any warrant or other instrument, or from taking any steps for the collection of said taxes, or from levying upon any goods or chattels to satisfy the same.

Taxes are a portion that each individual gives of his property, in

order to secure or have the perfect enjoyment of the remainder. Governments are established for the protection of persons and property within the limits of the State; taxes are levied to enable the Government to afford or give such protection. They are the price and consideration paid for the protection afforded.

When the property of an individual receives the protection of the State by its laws, it is right that he should afford to the State, in the way of taxes, a recompense or consideration for such protection; for otherwise that protection could not be extended to him. Without taxes the State would be powerless to afford protection. And when the property of an individual receives the protection of the State, it is equally right that the property protected, no matter whether it be real or personal, should in such way yield a recompense or consideration.

The owner of property within the limits of a State, no matter whether the property be real or personal, and no matter where the owner has his domicile, has a right to call upon the Government of the State to protect such property by its laws, and its officers acting under such laws. But such protection cannot be afforded unless means, by the way of taxes, are furnished to afford the protection. And taxes are no more to be levied upon the property of the resident to protect the property of the non-resident, than taxes are to be levied upon the property of a non-resident to protect the property of the resident.

The property of a non-resident within the limits of a State, whether it be real or personal, is equally protected by the laws, with the property of the resident. There would appear, therefore, to be no good reason why it should not equally pay in taxes for such protection: no good reason why the non-resident with the resident, should not give a portion in order to secure the perfect enjoyment of the remainder.

The laws of New York, like the laws of all the States in the Union, declare that all real estate within the State, by whomsoever owned, shall be taxed. The laws of the State, by virtue of which the taxes in the bill complained of were imposed, declare that all personal estate invested by a non-resident owner in business within the State

(and who, by such investing, calls upon the State for protection to such property), shall be assessed and taxed the same as if it were so invested by residents; that all personal property invested in business within the State shall pay alike for the security and protection afforded it by the Government, and means are provided by the laws to make it pay for such security and protection.

If a non-resident does not like to pay for such security and protection, he can withdraw his personal property from the State, and thus free himself from such payment. There is no law which compels him to put his property under the protection of the laws of a State of which he is not a citizen or residant. But while he asks and demands protection from the laws, there is no good reason why he should not pay for it; no good reason why he should demand that the property of the resident should pay for it; and there is no higher law of the United States which gives a non-resident a right to demand that the property of the resident citizen should pay for the protection afforded by the laws to the property of the non-resident. The equal "immunities and privileges" secured to the "citizens of each State," in the "several States," does not demand such a requirement as this. With respect to real estate, the non-resident cannot withdraw it from the State, even if he does not like the law, but is compelled to let it remain within the limits of the State where it is taxed.

The superior law of the United States, which forbids the imposition of duties by a State upon property imported from a foreign country, does not forbid the State, after it has been imported and has become mixed with other property in the State, and thereby requires the protection of the laws of the State, from exercising the right to require that such property, by whomsoever it may be owned, should pay for the protection afforded it.

It is admitted by the complainant, that the real estate of a non-resident is liable to pay, in taxes, for the protection afforded it by the State; and the chief reason urged why personal estate is not subject to the same rule is, that the rule of law is, that persoual estate follows the person of the owner, and that, therefore, it may be taxed in the State where the owner is domiciled. There is no

allegation in the bill that the personal estate of the complainant, invested by him in business within this State, has been taxed in New Jersey, the State of his domicil. But if it were so taxed, it would not follow that it could not be taxed in the State where it actually was, and where protection was actually afforded it. If a non-resident owner of real estate should be taxed in the State of his domicil, on an assessment of what he was worth, which should include the value of the real estate which he owns in another State; or, if he should be assessed upon his income, which included the rent of such real estate, that would be no good reason why the State in which the real estate was, and which actually affords the protection of its laws to it, and by which protection he would be able to receive rent, should not have the right to compel such real estate to contribute to the expense and cost of such protection actually afforded.

Bank stock is personal estate. According to the rule of law it follows, with all other personal property, the person of the owner. Such stock, whether owned by a resident or non-resident, is usually taxed in the State where the bank is located. It is believed that laws taxing such stock are not obnoxious to the charge of being opposed to any constitutional law, either state or national. It would seem to be enough that the property of a non-resident, whether that property be real or personal, should be put upon an equality in respect to taxation, with the property of a resident, without requiring that it should have greater privileges.

"The taxing power of a State is one of its attributes of sovereignty, and where there has been no compact with the federal government, or cession of jurisdiction for the purposes specified in the Constitution, this power reaches all the property *and business* within the State." *Nathan* vs. *Louisiana*, 8 Howard, p. 82. In the case of *Catlin* vs. *Hull*, 21 Vermont, 152, it was held "that the personal property of a non-resident in a State where he was not domiciled, might be taxed in such latter State."

The law of New York prescribes that the tax on the personal estate of such non-resident may be collected from the property of the firms, persons, or associations to which they severally belong.